Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

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Employee on medical leave may have another job. A full-time employee sought medical leave, even though she continued working in a similar position in another part-time job. The employer argued that this established conclusively that she had the ability to perform the work and was therefore not entitled to medical leave. The California Supreme Court disagreed, holding that the part-time job was evidence of the employee's ability to perform the work for her original employer but that the evidence was not conclusive. *Lonicki v. Sutter Health Central* (Cal.Supr.Ct.; April 7, 2008) 43 Cal.4th 201, [180 P.3d 321, 74 Cal.Rptr.3d 570, 2008 DJDAR 4917].

Plaintiff cannot avoid hearing on anti-SLAPP motion by amending complaint. In *Salma v. Capon* (Cal. App. First Dist., Div. 5; April 9, 2008) 161 Cal.App.4th 1275, [74 Cal.Rptr.3d 873, 2008 DJDAR 5108], cross defendant filed an anti-SLAPP motion (*Code Civ. Proc.* §425.16). Before the trial court ruled on the motion, cross-complainant filed an amended cross-complaint. No dice! The Court of Appeal held that a party cannot avoid a ruling on an anti-SLAPP motion by amending the pleading.

Note: A similar rule does not apply where a demurrer to a complaint (or cross-complaint) is filed. The plaintiff may amend the complaint, without leave of court being required, at any time until the hearing on the demurrer. (*Code Civ. Proc*. §472; *see also*, Weil & Brown, *California Civil Procedure Before Trial* (The Rutter Group), Chapter 6, §6:610.)

Arbitration may be denied to avoid inconsistent results. *Code Civ. Proc*. §1281.2 provides that where a party to an arbitration agreement is also a party to a pending court case with a different party arising out of the same transaction and there is a possibility of inconsistent results, the court has discretion to deny arbitration. The Federal Arbitration Act (9 U.S.C. §1, ff.) does not contain a similar provision. But the United States Supreme Court held in *Volt Information Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468, 472, [109 S.Ct. 1248, 1252, 103 L.Ed.2d 488, 498] that where the arbitration agreement is governed by California law, the FAA does not preempt section 1281.2. Therefore, even if the contract affects interstate commerce, section 1281.2 gives the court discretion to deny arbitration under the specified circumstances. *Best Interiors, Inc. v. Millie Severson, Inc.* (Cal. App. Second Dist., Div. 8; March 12, 2008) (ord. pub. April 11, 2008) 161 Cal.App.4th 1320, [75 Cal.Rptr.3d 1, 2008 DJDAR 5259].

Custom officials may search computer. The Ninth Circuit has held that custom officials do not need reasonable suspicion before they may search the laptop computer of an arriving traveler. The court, therefore, reversed the District Court's suppressing the evidence of child pornography that was found on the computer. *U. S. v. Arnold* (9th Circ.; April 21, 2008) 523 F.3d 941, [2008 DJDAR 5592].

Not all material in peace officer's personnel file is subject to "Pitchess motion." *Evid. Code* §§1043–1047 provide a procedure for the discovery of peace officer's personnel records, requiring a written motion with notice to the peace officer whose records are sought. The motion is called a "*Pitchess* motion" because the statute was enacted after our Supreme Court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, [522 P.2d 305, 113 Cal.Rptr. 897]. But the procedure only applies to the types of records specified in the statute. As to other documents, the mere fact that they happen to be contained in a personnel file does not, by itself, compel the invocation of the procedure. *Zanone v. The City of Whittier* (Cal. App. Second Dist., Div. 7; April 22, 2008) 162 Cal.App.4th 174, [75 Cal.Rptr.3d 439, 2008 DJDAR 5641].

There is no procedure for law firms to be admitted pro hac vice. *Cal. Rules of Court*, rule 9.40, governs eligibility for out-of-state lawyers to be admitted for the purpose of representing a client in a designated case. The rule governs individual lawyers, not law firms. There is no provision permitting law firms to be admitted *pro hac vice*. Furthermore, as long as lawyers are admitted in California, they may represent clients in this state, even if they are a member of an out-of-state law firm. *Daybreak Group, Inc. v. Three Creeks Ranch, LLC* (Cal. App. Fourth Dist., Div. 3; March 25, 2008) (ord. pub. April 16, 2008) 162 Cal.App.4th 37, [75 Cal.Rptr.3d 365, 2008 DJDAR 5639].

Action stayed under forum nonconveniens; failure to diligently prosecute foreign action results in dismissal. When an action is stayed on grounds of *forum nonconveniens*, plaintiff must show diligence in pursuing the action in the

Model Code of Civility and Professionalism

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alternate forum. If plaintiff fails to do so, the California action may be dismissed. *Van Keulen v. Cathay Pacific Airways Ltd.* (Cal. App. Second Dist., Div. 3; April 22, 2008) 162 Cal.App.4th 122, [75 Cal.Rptr.3d 471, 2008 DJDAR 5693].

No punitive damage allegations against religious corporations without court approval. Under *Code Civ. Proc.* §425.14, plaintiff may not plead punitive damages against a religious corporation without a court order based on a determination that plaintiff possesses evidence that "substantiates that [he or she] will meet the clear and convincing standard of proof." Section 425.13 contains a similar requirement for actions against health care providers for claims "arising out of [their] professional negligence."

In *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, [86 P.3d 290, 11 Cal.Rptr.3d 222] the California Supreme Court concluded that section 425.13 did not apply where a health care provider was sued under the elder abuse statute (*Welf. & Inst. Code* §§15600 ff.) But, *Little Company of Mary Hospital v. Sup.Ct.* (Marin) (Cal. App. Second Dist., Div. 7; April 23, 2008) 162 Cal.App.4th 261, [75 Cal.Rptr.3d 519, 2008 DJDAR 5738], held that this exception does not apply to religious corporations. Court approval must be obtained in an elder abuse case against such corporations before plaintiff may plead punitive damages.

Constructive suspicion is insufficient to trigger statute of limitations. In *Unruh-Haxton v. Regents of the University of California* (Cal. App. Fourth Dist., Div. 3; April 23, 2008) (*As Mod.* May 15, 2008) 162 Cal.App.4th 343; [76 Cal.Rptr.3d 146, 2008 DJDAR 5802], patients who had received fertility treatments sued for fraud, conversion, and emotional distress after they learned they were on a list of patients whose eggs had been stolen. Because several years earlier news sources had reported that physicians at the University of California clinic had stolen eggs, the trial court ruled that plaintiffs had constructive suspicion that their eggs may have been stolen and that, therefore, the statute of limitations barred their claim. The Court of Appeal reversed, holding that constructive awareness based on publicity was insufficient to trigger the statute of limitations.

Unlicensed contractor cannot recover for tasks that would not require a license. Under the Construction Services Licensing Law (*Bus. & Prof. Code* §§7000 ff.), an unlicensed building contractor or subcontractor may not maintain an action to recover on the contract. In *WSS Industrial Construction, Inc. v. Great West Contractors, Inc.* (Cal. App. Second Dist., Div. 8; March 28, 2008 (*ord. pub.* April 28, 2008) 162 Cal.App.4th 581, [76 Cal.Rptr.3d 8, 2008 DJDAR 6138], an unlicensed subcontractor sought to recover *inter alia* for those services it performed that, if subject to an independent contract, would not have required a license. The Court of Appeal rejected the argument, holding that the statute should be strictly construed in spite of its harsh results.

Client's misconduct justifies reduction in attorney fees. After the Teitler Family Trust won an action for breach of contract, it sought fees under the contract's attorney fee clause. The trial court granted the motion but reduced the amount of fees by 90% because Teitler had lied under oath about various matters during the course of the litigation. The trust appealed and the Court of Appeal affirmed the reduction in the fee award (Justice Cooper dissenting). The court noted that the award of attorney fees is governed by equitable considerations and the trial court has broad discretion to determine the amount. *EnPalm v. Teitler Family Trust* (Cal. App. Second Dist., Div. 8; April 30, 2008) 162 Cal.App.4th 770, [75 Cal.Rptr.3d 902, 2008 DJDAR 6343].